LAU YANG KIM v. RESCOM AUSTRALIA SDN BHD & ANOR

HIGH COURT MALAYA, GEORGETOWN
AMARJEET SINGH JC
[CIVIL ACTION NO: 22NCVC-18-03-2015]
23 JANUARY 2020

DAMAGES: *General damages – Legal fees – High Court ordered damages to be assessed and costs – Deputy Registrar assessed and awarded legal fees as general damages – Whether legal fees constitute general/special damages – Whether legal fees recoverable as general damages – Whether must be specifically pleaded and proved – Whether legal fees could be claimed as general damages for fraudulent misrepresentation – Whether legal fees have crystallised*

The plaintiff obtained a judgment from the High Court, against the defendants for the rescission of a sale and purchase agreement ('SPA') on the ground of fraudulent misrepresentation. The High Court Judge ('HCJ') ordered (i) the defendants to jointly and severally pay the sum of RM1,247,500 made up of the monies paid towards the purchase of the property, a furniture package for the property and as travelling and accommodation expenses to view the property, which was in Australia; (ii) general damages to be assessed; and (iii) costs. The Deputy Registrar ('DR') assessed and awarded a sum of RM127,002.80, as general damages. This sum was made up of RM177,002.80 as legal fees paid by the plaintiff to her solicitors less the costs of RM50,000 awarded by the HCJ. The defendants filed separate appeals against the decision of the DR. The issue that arose for determination in both appeals was whether legal fees in prosecuting an action for fraudulent misrepresentation could be recovered as general damages in the same action. Supporting their appeals, the defendants argued that (i) legal fees do not constitute general damages and could not be recoverable as general damages; (ii) legal fees are special damages which must be specifically pleaded and proved; (iii) the DR ought to have rejected the claim for legal fees as the plaintiff had already been compensated by an award of costs made by the HCJ on a 'standard basis'. Objecting to the defendants' contentions, the plaintiff submitted that the legal fees (i) were being claimed as damages for fraudulent misrepresentation; and (ii) incurred by the plaintiff flowed directly from the fraudulent misrepresentation.

Held (allowing appeals; setting aside order of Deputy Registrar in awarding legal fees as general damages):

(1) Special damages, in contrast to general damages, have to be specifically pleaded and strictly proved. The reason is to put the defendants on their guard and tell them what they have to meet when the case comes on trial. In claims for special damages, the exact loss must be pleaded where the precise amount of damages has become clear before the trial either because it has already occurred, and so became crystallised, or because it could be measured with complete accuracy. The basic test of

whether damages are general or special is whether particularity is necessary or useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial. Legal fees fall within the meaning of special damages. Legal fees are ascertained expenses and, therefore, particularity is necessary to warn the defendant of what is being claimed or the claims that he will be confronted with at the trial. The DR erred in law when awarding, as general damages, the legal fees and related legal expenses incurred by the plaintiff. (paras 17, 22 & 26)

(2) Order 59 r. 16(2) of the Rules of Court 2012 provides that the court assesses and awards costs of the action that is to be paid by one party to the proceedings to another party of those proceedings on a 'standard basis' unless it appears to the court that it is an appropriate case for costs to be assessed on an 'indemnity basis'. At the conclusion of the trial, the HCJ made an order of costs on the 'standard basis'. The exercise of the discretion to award costs would depend on the circumstances of the particular case. Hence, not all legal fees incurred must necessarily be allowed as they may not have been reasonably expended. In the present case, the plaintiff paid her solicitors for the works done, court attendances and other related expenses in respect of an application for summary judgment which was later withdrawn by her. A substantial sum of these legal expenses in these invoices was therefore not obviously incurred in establishing the plaintiff's legal rights. The amount of costs awarded by the HCJ effectively and reasonably indemnified the plaintiff in respect of the legal fees she had incurred in establishing her legal rights. The order on costs was final and could not be disturbed. (paras 23 & 24)

(3) The legal fees could not be pleaded and proved at the trial because the legal fees have yet to crystallise. To be entitled to an award of special damages, the items constituting special damages must have been expended before the trial begins. In the present case, the dates of the invoices that make up the legal fees ranged from 15 June 2015 until 13 August 2018 and the payment in respect of the last invoice was only made after the trial of this action was concluded. Therefore, the legal fees of a concluded action could not be claimed in the same action as special damages. (para 27)

(4) The costs awarded in this action were reflected in the order of the High Court. Once the order of court was perfected, it became a final order of court and if at all, could only be reversed by the appellate court. The DR, in allowing the plaintiff's claim to be indemnified in full for the legal fees she had paid her solicitor as general damages, clearly interfered and rendered the final order of costs made by the HCJ ineffective or redundant. The DR had no jurisdiction or power to do what he did. (para 25)

Case(s) referred to:

Abdul Razak Datuk Abu Samah v Shah Alam Properties Sdn Bhd & Another Appeal [1999] 3 CLJ 231 CA ***(refd)***

Doyle v. Olby (Ironmongers) Ltd [1969]2 All ER 119 ***(refd)***

Minty Holdings Sdn Bhd v. JB Properties Sdn Bhd & A Third Party [1998] 1 LNS 214 HC ***(refd)***

Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***

Phillips v. Phillips [1878] 4 QBD 127 ***(refd)***

Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***

Sitti Rajumah & Anor v. Mohd Rafiuddin Elmin [1996] 4 CLJ 274 HC ***(refd)***

Smith New Court Securities Ltd v. Scrimgeour Vickers (Asset Management) Ltd [1996] 4 All ER 769 ***(refd)***

Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors [2012] 2 CLJ 712 CA ***(refd)***

Yap Soo Ping & Anor v. Kee Wah Soong [2018] 1 LNS 1020 HC ***(refd)***

Legislation referred to:

Courts of Judicature Act 1964, s. 25(2), Schedule para 15

Rules of Court 2012, O. 59 rr. 1, 16(1), (2)(a), (3), (4), 19

For the plaintiff - MS Rajendran & Nur Fasihah Shahrol Azam; M/s Rajen & Assocs

For the 1st defendant - Elson Beh & Yeoh Rui Ming; M/s Peter Ling & Co

For the 2nd defendant - Elson Beh & Yeoh Rui Ming; M/s Mohd Imtiaz Choong & Partners

Reported by Najib Tamby

JUDGMENT

Amarjeet Singh JC:

Introduction

[1] On 31 October 2018, the plaintiff obtained a judgment from the High Court against the defendants for the rescission of a sales and purchase agreement on the ground of fraudulent misrepresentation. The learned judge ordered that the defendants jointly and severally pay the sum of RM1,247,500 made up of the monies paid towards the purchase of the property, a furniture package for the property and as 'travelling and accommodation' expenses to view the property which is in Melbourne, Australia.

[2] The learned judge also made the following two orders:

(i) that general damages be assessed; and

(ii) RM50,000 as costs of the action.

[3] On 5 July 2019, the learned Deputy Registrar of the High Court assessed and awarded a sum of RM127,002.80 as general damages. This sum was made up of RM177,002.80 as the legal fees the plaintiff had paid her solicitors less the costs of RM50,000 awarded by the learned judge. Thus,

the learned Registrar had in fact awarded legal fees on an "indemnity basis" to indemnify fully the plaintiff in the form of general damages the legal fees the plaintiff had paid her solicitors to establish her legal rights.

[4] The defendants filed separate notices of appeal to the judge in chambers against the decision of the learned Deputy Registrar. Enclosure 232 is the notice of appeal dated 19 July 2019 filed by the first defendant while encl. 233 is the notice of appeal dated 24 July 2019 filed by the second defendant. This is my decision in respect of both the enclosures.

Submissions

[5] The defendants submitted that legal fees do not constitute general damages and therefore cannot be recoverable as general damages. They relied on the statement made in the High Court case of *Minty Holdings Sdn Bhd v. JB Properties Sdn Bhd & A Third Party* [1998] 1 LNS 214 which stated that legal fees are in fact special damages which must be specifically pleaded and proved and that since the order related to general damages a plaintiff is not entitled to claim legal fees as general damages.

[6] In addition, the defendants relied on the decision by Ian HC Chin J in *Sitti Rajumah & Anor v. Mohd Rafiuddin Elmin* [1996] 4 CLJ 274 where it was held that legal fees cannot constitute special damages or general damages as legal fees are governed by the rules of court governing the award of costs.

[7] It was contended that the learned Deputy Registrar ought to have rejected the claim for legal fees as the plaintiff had already been compensated by an award of costs made by the learned judge on a "standard basis" or formally known as "party to party basis". As such, counsel submitted that the learned Registrar had erred in law in allowing legal fees again in the form of general damages.

[8] Counsel for the plaintiff, on the other hand, submitted that the legal fees were being claimed as damages for fraudulent misrepresentation based on the principle stated in *Abdul Razak Datuk Abu Samah v. Shah Alam Properties Sdn Bhd & Another Appeal* [1999] 3 CLJ 231. In this case the Court of Appeal had established that a plaintiff is entitled to recover expenditure incurred reasonably and properly in consequence of and flowing directly from the misrepresentation whether the expenditure is incurred before or after the rescission of the agreement.

[9] Counsel submitted that the legal fees incurred by the plaintiff flowed directly from the fraudulent misrepresentation. In support, counsel also relied on the case of *Yap Soo Ping & Anor v. Kee Wah Soong* [2018] 1 LNS 1020; [2018] MLJU 1449 where legal fees paid to the solicitors had been allowed as damages by the High Court.

[10] The learned Deputy Registrar agreed with counsel's submissions and decided that the plaintiff was entitled to recover as general damages the balance sum of the RM177,002.80 paid as legal fees since the High Court had only awarded RM50,000 as costs.

Issue

[11] In both the enclosures the issue is the same, whether legal fees in prosecuting an action for fraudulent misrepresentation could be recovered as general damages in the same action.

Analysis And Decision

[12] The issue for determination requires this court to consider the relevant law and principles governing the awarding of costs and the awarding of general and special damages.

Costs

[13] It was established by the Federal Court in *Vellasamy Pennusamy & Ors v. Gurbachan Singh Bagawan Singh & Ors* [2012] 2 CLJ 712 that the power to award costs is at the discretion of the court and that the purpose of awarding costs is to indemnify the successful litigant for the legal expenses they had incurred in establishing their legal rights.

[14] The power to award costs is a statutory power provided by sub-s. (2) of s. 25 read with para. 15 of the Schedule to the Courts of Judicature Act 1964. These provisions provide that the power is to be exercised in accordance with any written law or rules of court relating to the same. The rules of court that expressly provide for costs are the Rules of Court 2012. Order 59 r. 1 defines "costs" to include fees, charges, disbursements, expenses and remuneration while r. 19 provides that the amount of costs (excluding disbursement) that are payable shall be at the discretion of the court and shall be determined upon the conclusion of the trial. It is also provided that in fixing the costs payable, the court must have regard to the relevant circumstances including but not limited to the factors set out in r. 16(1) which are as follows:

(i) the complexity of the item or of the cause or matter in which it arises and the difficulty or novelty of the questions involved;

(ii) the skill, specialised knowledge and responsibility required of, and the time and labour expended by, the solicitor or counsel;

(iii) the number and importance of the documents, however brief, prepared or perused;

(iv) the place and circumstances in which the business involved is transacted;

(v) the importance of the cause or matter to the client;

(vi) where money or property is involved, its amount or value;

(vii) any other fees and allowances payable to the solicitor or counsel in respect of other items in the same cause or matter, but only where work done in relation to those items has reduced the work which would otherwise have been necessary in relation to the item in question.

[15] Order 59 r. 16(2)(a) provides that subject to the other provisions of the Rules, the amount of costs is determined on a "standard basis" unless it appears to the court that costs to be determined on an "indemnity basis" which is similar to the costs determined on "solicitor and own client basis". On the "standard basis" a reasonable amount in respect of all costs reasonably incurred is allowed as opposed to the "indemnity basis" where all costs are allowed except in so far as they are of an unreasonable amount or have been unreasonably incurred (see rr. 16(3) and (4)).

[16] In the present case, the plaintiff had merely prayed for costs and did not pray for costs on an "indemnity basis" or on a "solicitor and own client basis". The learned judge had assessed and awarded costs on the "standard basis". It is also clear that legal fees is an integral part of costs whether the costs is awarded on a "standard basis" or "indemnity basis".

Special Damages

[17] With regard to special damages, I gratefully adopt the principles summed up by Syed Agil Barakbah FJ in *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 and summarised as follows:

(i) special damages in contrast to general damages have to be specifically pleaded and strictly proved;

(ii) the reason that special damages have to be specifically pleaded is to put the defendants on their guard and tell them what they have to meet when the case comes on trial (per Cotton LJ in *Phillips v. Phillips* [1878] 4 QBD 127 at p. 139);

(iii) in claims for special damages, the exact loss must be pleaded where the precise amount of damages has become clear before the trial either because it has already occurred and so become crystallised or because it can be measured with complete accuracy; and

(iv) the basic test of whether damage is general or special is whether particularity is necessary or useful to warn the defendant of the type of claim and evidence, or of the specific amount of claim, which he will be confronted with at the trial.

Measure Of Damage For Fraudulent Misrepresentation

[18] The law governing the measure of damages for fraudulent misrepresentation was enunciated by Lord Denning MR in *Doyle v. Olby (Ironmongers) Ltd* [1969] 2 All ER 119 as follows:

> In fraud, the defendant has been guilty of a deliberate wrong by inducing the plaintiff to act to his detriment. The object of damages is to compensate the plaintiff for all the loss he has suffered, so far, again, as money can do it. In contract, the damages are limited to what may reasonably be supposed to have been in the contemplation of the parties. In fraud, they are not so limited. The defendant is bound to make reparation for all the actual damage directly flowing from the fraudulent inducement. The person who has been defrauded is entitled to say: 'I would not have entered into this bargain at all but for your representation. Owing to your fraud, I have not only lost all the money I paid you, but, what is more, I have been put to a large amount of extra expense as well and suffered this or that extra damages'.
>
> All such damages can be recovered: and it does not lie in the mouth of the fraudulent person to say that they could not reasonably have been foreseen. For instance, in this very case the plaintiff has not only lost the money which he paid for the business, which he would never have done if there had been no fraud: he put all that money in and lost it; but also he has been put to expense and loss in trying to run a business which has turned out to be a disaster for him. He is entitled to damages for all his loss, subject, of course, to giving credit for any benefit that he has received.

[19] The law stated in *Doyle v. Olby (Ironmongers) Ltd (supra)* was approved by the House of Lords in *Smith New Court Securities Ltd v. Scrimgeour Vickers (Asset Management) Ltd* [1996] 4 All ER 769 where Lord Browne-Wilkinson stated (at p. 777) that the measure of damages where a contract has been induced by fraudulent misrepresentation is reparation for all the actual damage directly flowing from (ie, caused by) entering into the transaction and are not limited to those which were reasonably foreseeable. The damages recoverable also include consequential loss suffered by reason of having acquired the asset.

[20] This principle was followed by the Court of Appeal, amongst other cases, in *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227 and in *Abdul Razak Datuk Abu Samah (supra)* where it was stated that:

> Damages for fraud are awarded on the basis that the innocent representee is put, so far as money can do so, in the position which he would have occupied had there been no reliance on the fraudulent inducement.
>
> ... The assessment of damages would therefore include all expenditure incurred reasonably and properly in consequence of and flowing directly from the deceit, whether before or after the date of the rescission.

[21] Thus, the plaintiff is entitled in a case of fraudulent misrepresentation to plead and claim all actual damages directly flowing from or caused by the entering into the agreement induced by the misrepresentation. In the present case, the actual damages directly flowing from entering into the agreement were pleaded. The damages was made up of the monies that were paid towards the purchase of the property, the furniture package for the property, the 'travelling and accommodation' expenses and the interest lost as a result of being kept out of the monies.

Decision

[22] In the present case, the learned Deputy Registrar had assessed the ascertained legal fees that were paid by the plaintiff to her solicitors and from the assessed amount went on to deduct the RM50,000 costs that was awarded by the learned judge. In my judgment, the learned Deputy Registrar had erred in law when awarding as general damages the legal fees and related legal expenses incurred by the plaintiff. My reasons are as follows.

First Reason

[23] Order 59 r. 16(2) provides that the court assesses and awards costs of the action that is to be paid by one party to the proceedings to another party of those proceedings on a "standard basis" unless it appears to the court that it is an appropriate case for costs to be assessed on an "indemnity basis".

[24] At the conclusion of the trial in the present action, the learned judge made an order of costs on the "standard basis". The exercise of the discretion to award costs would depend on the circumstances of the particular case. Hence, not all legal fees incurred must necessarily be allowed as they may not have been reasonably expended. For example, in the present case the plaintiff paid her solicitors for the work done, court attendances and other related expenses in respect of an application for summary judgment which was later withdrawn by her, see Invoices No. R/220/15 for RM9,069 dated 15 June 2015, No. R/368/15 for RM11,060.80 dated 19 November 2015 and No. R/112/16 for RM11,100 dated 12 August 2016. A substantial sum of these legal expenses in these invoices was therefore not obviously incurred in establishing the plaintiff's legal rights. In my judgment, following the principle in *Vellasamy Pennusamy & Ors* (*supra*), the amount of costs awarded by the learned judge had effectively and reasonably indemnified the plaintiff in respect of the legal fees she had incurred in establishing her legal rights. This order on costs is final and cannot be disturbed.

[25] The costs that were awarded in this action are reflected in the order of the court dated 31 October 2018. Once the order of court was perfected, it became a final order of court and if at all, could only be reversed by the appellate court. The learned Deputy Registrar in allowing the plaintiff's claim to be indemnified in full for the legal fees she had paid her solicitors

as general damages had clearly interfered and rendered the final order of costs made by the learned judge ineffective or redundant. In my judgment, the learned Deputy Registrar had no jurisdiction or power to do what he did.

Second Reason

[26] In my view, legal fees fall within the meaning of special damages. I reached this conclusion after applying the test stated in *Ong Ah Long (supra)*. I find that legal fees are ascertained expenses and therefore particularity is necessary to warn the defendant of what is being claimed or the claims that he will be confronted with at the trial.

[27] However, in the present case the legal fees could not be pleaded and proved at the trial because the legal fees have yet to crystallise. To be entitled to an award of special damages the items constituting special damages must have been expended before the trial begins. In the present case, the dates of the 12 invoices that make up the legal fees ranged from 15 June 2015 until 13 August 2018 and the payment in respect of the twelfth invoice was only made on 15 October 2018 after the trial of this action was concluded. Therefore, the legal fees of a concluded action cannot be claimed in the same action as special damages.

[28] It is for this reason that written law has expressly provided the mechanism for a successful litigant to claim legal fees expended to establish his legal rights in the form of costs. The written law are the relevant provisions in the Courts of Judicature Act 1964 read with the Rules of Court 2012 (see para. [14] above). The costs of the action have been awarded according to the principle provided therein.

Conclusion

[29] For the above reasons, I hold that the legal fees claimed and awarded as general damages to the plaintiff is wrong in law warranting interference of the lower court's decision by this court. The appeals in encls. 232 and 233 are therefore allowed with costs and the order of the learned Deputy Registrar in awarding legal fees as general damages is set aside.